INDEX

CITATIONS

Cases—Continued

Constitution, statutes, and rules:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 43

WILLIAM J. McCARTHY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (App. 19–27) is reported at 387 F. 2d 838.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1968. A petition for rehearing was denied on February 5, 1968 (App. 28). Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari until March 11, 1968. The petition was filed on March 7, 1968, and was granted on April 29, 1968 (390 U.S. 1038). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the record shows that petitioner's plea of guilty was entered voluntarily, with knowledge of the nature of the charge and the consequences of the plea, and contains sufficient assurances that a factual basis existed for the guilty plea.

2. Whether the district court complied with Rule 11, F.R. Crim. P., in accepting petitioner's guilty plea.

3. Whether, if the trial judge is found to have failed technically to comply with Rule 11, the judgment of conviction should be vacated, or the case remanded for a hearing on whether the guilty plea was voluntarily and knowingly entered.

RULE INVOLVED

Rule 11, F.R. Crim. P., provides:

> A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

STATEMENT

On April 1, 1966, a three-count indictment was returned in the United States District Court for the Northern District of Illinois charging that petitioner willfully attempted to evade income taxes for the calendar years 1959, 1960 and 1961 by filing fraudulent returns (which understated his income by approximately $3,000, $13,000, and $6,000, respectively) in violation of 26 U.S.C. 7201 (App. 2–3). On April 14, petitioner, represented by retained counsel, entered a plea of not guilty to all counts, and trial was set for June. At a hearing on June 29, the court postponed trial because of petitioner's illness. The court asked government counsel how long the trial would take, and he replied, "Well, it is anticipated the matter will not go to trial, according to counsel" (App. 5). A new trial date was set for July 15 (App. 5).

On July 15, petitioner's counsel moved to withdraw the plea of not guilty as to count 2, and to enter a plea of guilty to that count. Counsel referred to the matter as "a tax fraud case" (App. 6), and told the court that he had advised petitioner of the consequences of the guilty plea (App. 7). Government counsel stated that he did not oppose the change of plea and would move to dismiss the remaining counts. The court noted that a "tax evasion" charge was involved, and then discussed the plea with petitioner. Petitioner assured the court that he understood that the maximum penalty was five years' imprisonment and a $10,000 fine; that he was aware that the plea constituted a waiver of jury trial; and that he was making the plea voluntarily without any promises or threats. When asked about the latter, petitioner answered that he was pleading guilty "of my own volition, your Honor." Obviously satisfied

with petitioner's expression of awareness of his action, the court accepted the guilty plea and ordered a pre-sentence investigation (App. 7–8).

On September 14, petitioner appeared for sentencing. Prior to pronouncing sentence, the court asked if petitioner had anything to say. Petitioner replied that he was sorry that this situation had arisen and blamed it on "my health and the things that I have gone through," and further stated that "it is not deliberate and I am very sorry" (App. 9). Defense counsel then spoke on petitioner's behalf, noting that "there has been a very thorough pre-sentence investigation made in this case," and that "we have been given an opportunity to submit a good deal of material to [the probation officer] and I am satisfied that the Court has had an opportunity to examine it" (App. 9–10). Counsel indicated that he could add little to the extensive report of the probation officer except that petitioner was contrite (App. 10). Government counsel requested that the court incorporate in its sentence the parties' understanding that the taxes owed by petitioner, along with the related penalties, would be paid. Defense counsel noted that petitioner was aware of his obligation to pay the arrears, and the court observed that he had more than sufficient assets to cover the amount owed. The court then imposed a sentence of imprisonment for one year and a $2500 fine, remarking that, in view of the substantial amount of taxes involved, "the deterrent effect of a sentence is desirable" (App. 10).

The balance of the sentencing hearing was devoted to a discussion of defense counsel's motion that peti-

tioner's sentence be suspended. Counsel noted that petitioner was 65 years old, that he had overcome a drinking problem and had psychological difficulties. He said that after the tax investigation started, petitioner freely answered all questions of the investigator (App. 10–11). The court noted that petitioner's books were in such shape that it was difficult to determine what was owing, and stated that "the manner in which the books were kept was not inadvertent" (App. 11). Counsel urged that this was due to petitioner's general pattern of gross neglect (App. 13–14). He said (App. 14):

> I could not have, in good conscience, recommended that he go into a plea if I did not feel that neglect has become criminal when it reaches a certain stage. But this was not part of any elaborate scheme or any devious course of conduct where he was acting in contemplation of a tax return.

The court noted that the acts had taken place over a four-year period and suggested that, if the government had not stepped in, the pattern would have continued for eight years (App. 15). Counsel replied that "before this indictment" petitioner had consulted counsel about his accountability to the government (*ibid.*). The court declined to suspend the sentence previously pronounced (App. 16).

Nine days after sentencing, petitioner, represented by new counsel, filed his notice of appeal (App. 18). In his argument to the Seventh Circuit, petitioner claimed that the district court had failed to make a proper inquiry pursuant to Rule 11, F.R. Crim. P.,

and that the court had abused its discretion in accepting his guilty plea without assurance that petitioner understood the nature of the charge. In addition, petitioner argued that the judgment of conviction was entered without determining that a factual basis existed for the plea. Finally, petitioner contended that his rights under the Fifth and Sixth Amendments were denied by the court's entry of judgment on his plea without determining that he comprehended the charge against him (see App. 19–20). The court of appeals affirmed the conviction (App. 19–27, 28).

SUMMARY OF ARGUMENT

I

Considering the instant record as a whole, it cannot seriously be doubted that petitioner entered his plea of guilty voluntarily with full awareness of the nature of the charge and the consequences of the plea. Petitioner had a copy of the indictment two months before he pleaded guilty. He was charged in simple language with willfully attempting to evade the payment of taxes by filing a false return, knowing that the amount of earnings reported was less than the actual amount. From the time of indictment petitioner was represented by able and experienced counsel, who engaged in numerous conferences with petitioner, apparently over the issue of willfulness, since his tax liability was never publicly disputed. The statements of petitioner and his counsel at the hearings where the plea was entered and where sentence was imposed demonstrate petitioner's complete understanding of the nature of the proceedings. In the context of these hearings,

nothing uttered by petitioner can properly be viewed as a signal that he did not comprehend the nature of the charge against him.

Petitioner's extensive reliance on a single phrase—"it is not deliberate"—in a statement made just prior to sentencing, and some two months after he had pleaded guilty, is misplaced. The statement does not show that petitioner either was unaware that willfulness was an essential element of the offense to which he had pleaded guilty or was in fact not guilty of that offense. Rather, it was part of a typical expression of contrition by a convicted defendant, presumably designed to secure leniency from the sentencing judge.

II

The inquiry conducted by the trial judge at the time petitioner entered his plea of guilty was in substantial compliance with Rule 11, as amended in 1966. In the first place, Rule 11 does not purport to prescribe a precise formula to be utilized in satisfying its general requirements. Instead, it preserves a desirable degree of flexibility and discretion for trial judges in this regard. And, although the judge could have made a more searching inquiry into petitioner's understanding of the nature of the charge, the fact that he did not must be considered in context. Petitioner was an intelligent businessman who was represented by experienced counsel, and who had discussed pleading guilty weeks before the plea was entered. When, therefore, petitioner persisted in his plea during the court's questioning, there was no reason, considering all the circumstances, for further elaboration.

Moreover, as previously stated, nothing occurred before the sentence was imposed to give the court reason to believe that the plea was not entered with knowledge of the nature of the charge.

III

Even if the trial judge's inquiry could be viewed as technically defective under Rule 11, petitioner is not automatically entitled to have the judgment of conviction set aside. Rather, the ultimate question here presented is actually whether the plea was in fact entered voluntarily and knowingly. If this Court should decide, therefore, that the record shows noncompliance with Rule 11 and does not affirmatively show that the plea was voluntary and knowing, a hearing in the district court should be ordered to resolve this issue. That result would be particularly appropriate here, since petitioner never gave the trial court an opportunity, by way of a motion to withdraw the plea under Rule 32(d), to consider his challenge to the sufficiency of the procedure followed under Rule 11.

ARGUMENT

I. THE RECORD AS A WHOLE LEAVES NO DOUBT THAT PETITIONER'S GUILTY PLEA WAS VOLUNTARILY ENTERED WITH FULL KNOWLEDGE OF THE OFFENSE WITH WHICH HE WAS CHARGED AND THE CONSEQUENCES OF HIS PLEA

Considering the instant record as a whole, there can be no doubt, we submit, that petitioner's guilty plea was in fact voluntarily made, with full knowledge of the nature of the offense with which he was charged and the consequences of his plea. Accordingly, the

judgment of conviction was properly entered upon the basis of that plea, and the court of appeals correctly affirmed. Indeed, it appears that petitioner's attack on his conviction stems primarily from his disappointment with his sentence—*i.e.*, he was given a prison term which the trial judge refused to suspend.[1] Thus, petitioner's present contentions appear to be, in the words of the court below, "appellate proceeding afterthought[s]" (App. 24) skillfully developed by new counsel.

Even before indictment, petitioner had consulted with counsel regarding his tax liability, according to the attorney who represented him in the district court (App. 15).[2] From the time of indictment, more than two months before he pleaded guilty, petitioner was represented by Mr. Sokol, a former Assistant United States Attorney and an experienced practitioner. The indictment charged in simple language that petitioner willfully attempted to evade the payment of taxes for three different years by filing false returns knowing that the amounts of earnings reported were substantially less than the actual amounts. Petitioner therefore knew exactly the nature of the crimes of which he was accused.

The question whether petitioner would plead guilty had obviously been under discussion for some time

[1] Disappointment in a sentence is of course not a basis for setting aside a judgment on a plea of guilty. See *Miles* v. *United States*, 385 F. 2d 541 (C.A. 10); *Vanater* v. *Boles*, 377 F. 2d 898 (C.A. 4); *White* v. *United States*, 354 F. 2d 22 (C.A. 9); *Kadwell* v. *United States*, 315 F. 2d 667, 670 (C.A. 9).

[2] It is reasonable to infer that this occurred after the government's investigation had commenced but before petitioner was indicted.

for, on June 29, more than two weeks before he entered his plea, government counsel indicated that a trial might not be necessary. Since petitioner's tax liability was never publicly disputed,[3] any discussions with respect to a plea between petitioner and his attorney necessarily related primarily to the element of willfulness, which would have presented the only real issue at the trial. Petitioner's counsel, in urging suspension of the sentence pronounced, showed that he had considered that issue extensively. While he phrased it to the court in terms of the neglect being so gross as to become criminal (App. 14),[4] he had obviously concluded that a defense of lack of willfulness could not be sustained, and had so advised his client.

When petitioner entered a plea of guilty to count 2, he gave no indication that he could not or did not comprehend the proceedings. Petitioner's counsel initially noted that the matter involved was "a tax fraud case" (App. 6), and the court shortly thereafter referred to the case as involving "tax evasion" (App. 7). In response to a series of questions which the court propounded directly to him, not to his counsel, petitioner

[3] Government counsel noted at sentencing that he had moved to dismiss counts 1 and 3 after the plea to count 2. He stated that the prime consideration "of that"—*i.e.*, dismissal of those two counts—was that all taxes, interest and penalties would be paid (App. 10). Petitioner's counsel said "[t]here has never been any disposition to avoid such a consequence," and the court noted that petitioner had ample assets from which to collect the amounts due (*ibid.*).

[4] Petitioner's counsel stated that he "could not have, in good conscience, recommended that [petitioner] go into a plea if [he] did not feel that neglect has become criminal when it reaches a certain stage" (App. 14; see *supra*, p. 5).

stated that it was true that he desired to plead guilty to count 2, that he recognized that the plea constituted a waiver of jury trial and could lead to incarceration for five years and a $10,000 fine, and that he entered the plea without threat or promise, of his "own volition" (App. 7–8).

For the next two months, petitioner made no attempt to withdraw the plea. Rather, he and his counsel provided the probation officer with all the information they thought would show whatever might be considered in mitigation of petitioner's conduct (App. 9–10). The probation report, by counsel's statement, reflected that petitioner and his counsel had been given "an opportunity to submit a good deal of material," and counsel stated that he was "satisfied that the Court has had an opportunity to examine it" (App. 9–10). No motion to withdraw the plea of guilty, on the ground that the facts so freely revealed did not show the offense of willfully failing to pay taxes, was ever filed or, indeed, so far as the record shows, ever contemplated.

Under these circumstances, petitioner's statement, when he was asked what he wished to say before the sentence was imposed—that "it [was] not deliberate" and would not have happened "if it were not for my health and things that I have gone through"—did not indicate that petitioner had not known that he was charged with acting willfully (App. 9).[5] To the con-

[5] Significantly, petitioner's present contentions do not focus extensively on the events of the day his plea was entered and accepted, but rather on four words in this statement he made some two months later, just before the imposition of sentence, as assertedly showing that he did not understand fraudulent

trary, that statement, viewed in context, constituted nothing more than the usual expression of contrition by a defendant who hoped for a lenient sentence. Even after the sentence was imposed, in arguing for suspension, petitioner's counsel admitted that the alleged "neglect" was so gross as to be in his mind criminal.

The trial judge had no reason to believe that on the matter of willfulness—the only possible issue in the criminal trial—counsel would not have advised his client, before the decision was made to enter a guilty plea, that the defense had no prospect of success. Moreover, the court had before it the facts in the pre-sentence report, and the judge obviously was convinced by those facts that petitioner's failure to pay taxes was not inadvertent and would have continued indefinitely if the government had not started an investigation.[6] In sum, the record here amply demonstrates that petitioner understood what he was charged with and the consequences of pleading guilty, and thus knowingly and voluntarily entered his guilty plea.

---

intent to be an element of the crime charged (*e.g.*, Pet. Br. 17, 23, 25, 28, 30). However, as the court of appeals pointed out, "the critical date as to defendant's physical and mental being was July 15, 1966 when his plea of guilty was entered * * *" (App. 23)—not the earlier dates when he filed the tax returns or the later date when he was sentenced.

[6] Thus, the trial judge stated that, in his view, "the manner in which [petitioner's] books were kept was not inadvertent" (App. 11), and that, "if the government had not stepped in," petitioner's derelictions would have continued significantly longer (App. 15).

II. THE JUDGMENT OF CONVICTION WAS ENTERED IN COMPLIANCE WITH RULE 11

Rule 11, as amended in 1966, imposes two duties on the trial judge. It requires that, before accepting a plea of guilty, the court address the defendant personally to determine "that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea." It then provides that the court should not enter a judgment upon a plea of guilty "unless it is satisfied that there is a factual basis for the plea." The notes of the advisory committee which drafted the amended rules make clear that this second requirement may be satisfied by a pre-sentence report.[7]

Here the trial judge, before accepting the plea of guilty, addressed petitioner personally to ascertain

[7] In pertinent part, the advisory committee notes relating to Rule 11 provide (18 U.S.C.A., F.R. Crim. P., Rule 11, 1967 pocket part, p. 134):

> A new sentence is added at the end of the rule to impose a duty on the court in cases where the defendant pleads guilty to satisfy itself that there is a factual basis for the plea before entering judgment. The court should satisfy itself, by inquiry of the defendant or the attorney for the government, or by examining the presentence report, or otherwise, that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty. Such inquiry should, e.g., protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge. * * * The normal consequence of a determination that there is not a factual basis for the plea would be for the court to set aside the plea and enter a plea of not guilty.

that the plea was voluntarily made with knowledge of the consequences. Moreover, the judge, before entering the judgment of conviction, satisfied himself on the basis of the pre-sentence report (see App. 25–26), that there was a factual basis for the plea.[8] As already discussed, the record shows that the judge was convinced that petitioner's evasion of taxes was deliberate (*e.g.*, App. 11).

It is claimed, however, that before accepting the plea the trial judge did not sufficiently inquire into the petitioner's understanding of the nature of the charge against him. Undoubtedly, the judge could have been more explicit in this respect. But Rule 11, quite obviously intentionally, does not prescribe the precise manner in which a district judge is to determine a defendant's understanding of the nature of the charge. Rather, it simply directs the judge to address the defendant personally and determine the voluntary and knowing nature of his guilty plea before accepting it. Rule 11 thus preserves a desirable degree of flexibility and discretion for trial judges as regards the most ef-

[8] Petitioner's extended argument to the contrary (Pet. Br. 24–29) is hinged primarily on his statement at the sentencing hearing that his actions were "not deliberate" (App. 9). As pointed out earlier (*supra*, pp. 11–12), however, petitioner's statement, taken as a whole, was simply an expression of contrition by an admittedly guilty defendant, and contained nothing that should have led the court to inquire further as to whether, some two months earlier, petitioner had understood the nature of the charge to which he then pleaded guilty and whether there was a factual basis for his plea. In view of the plain language of the indictment, and the judge's admonition that the charge carried serious felony penalties, petitioner's suggestion of possible confusion with lesser included offenses (Pet. Br. 25) is unacceptable (see App. 23–24).

fective way to proceed in satisfying the general requirements it establishes. *E.g., United States* v. *Lowe*, 367 F. 2d 44 (C.A. 7); see generally cases cited *infra*, pp. 18–19. Here the judge's approach was consistent with that flexibility and within the bounds of that discretion, and thus, as the court of appeals concluded, the district court "satisfied the requirements of [R]ule 11 * * * in accepting [petitioner's] plea of guilty" (App. 23).

Moreover, the adequacy of the trial judge's inquiry regarding petitioner's comprehension of the crime with which he was charged cannot be determined apart from its setting. The court was not dealing with a poor, ignorant defendant represented by counsel appointed for him shortly before arraignment. Rather, it was dealing with an established businessman of over 60 years of age with substantial assets who knew he was charged with having intentionally understated his income for the year in question by some $13,000. The judge knew that petitioner had been represented by experienced counsel ever since indictment,[9] and that there had been discussion of a plea of guilty more

[9] Contrary to petitioner's suggestion (Pet. Br. 20), the court of appeals did not read Rule 11 as not requiring the trial judge to address himself personally to a defendant represented by counsel. The court below did "make the general observation that [petitioner] was represented by retained competent counsel, who was not confused and did not misunderstand the indictment charge and the consequences of the plea of guilty" (App. 26). Here the judge plainly did address petitioner personally before accepting his plea (see App. 7–8). And surely the presence of counsel and the fact that a defendant is acting upon the informed advice of such counsel are factors which can properly be considered by a reviewing court in determining whether Rule 11 has been complied with sufficiently. See *Munich* v. *United States*, 337 F. 2d 356, 359, n. 5 (C.A. 9).

than two weeks before the plea was entered. When, therefore, petitioner assured the court that he wanted to enter a plea to count 2, that he persisted in his plea despite knowledge of the consequences, and that he was entering the plea of his own volition, the court could properly assume that petitioner was entering that plea with a complete understanding of the charge against him.

All of the circumstances combined to provide the trial court with a sound basis for "*determining* that the plea [was] made voluntarily with understanding of the nature of the charge * * *," which is what Rule 11 requires (emphasis added). So long as this requirement was met, Rule 11 was satisfied even though the court did not precisely describe the various elements of the crime with which petitioner was charged. And, as previously discussed (*supra*, pp. 11–12), nothing that happened subsequently, prior to or at the time of sentencing casts any doubt upon the fact that the plea was knowingly entered. Petitioner's cooperation with the probation officer showed that he did not want to withdraw his plea. His claim at sentencing that he did not act deliberately was but a way of contritely pleading for a lenient sentence, which the judge ultimately found unjustified by all the circumstances.

In short, petitioner seeks to engraft on Rule 11's generalized mandate a requirement for specificity and detail that neither its drafters nor sound administration of criminal justice requires.

III. A TECHNICAL FAILURE TO COMPLY WITH RULE 11 BEFORE ACCEPTING A GUILTY PLEA DOES NOT JUSTIFY VACATION OF A JUDGMENT OF CONVICTION IF THE PLEA WAS IN FACT VOLUNTARILY ENTERED WITH AN UNDERSTANDING OF THE CHARGE AND OF THE CONSEQUENCES

A. *Failure to comply with Rule 11 does not automatically require vacation of the judgment of conviction.*

Even assuming that the inquiry by the trial judge might have been technically deficient under Rule 11, this would not automatically entitle petitioner to have the judgment of conviction set aside. The ultimate question is not whether the judge, in accepting petitioner's guilty plea, literally complied with Rule 11, but whether in fact the plea was voluntarily and knowingly entered with an understanding of the charge and the consequences. *Cochran* v. *United States*, 365 F. 2d 310 (C.A. 6); see also *Lane* v. *United States*, 373 F. 2d 570 (C.A. 5); *United States* v. *Rizzo*, 362 F. 2d 97 (C.A. 7). As stated in *Turner* v. *United States*, 325 F. 2d 988, 989 (C.A. 8):

> The processes of informing an accused of the nature of the charges against him, of advising him of his right to be prosecuted by indictment, of appraising his consent to be prosecuted in information, and of accepting his plea of guilty as being voluntarily and understandingly made, are matters of reality and not of ritual. * * *

Only the Ninth Circuit, in a case relied upon by petitioner (Pet. Br. 20, 23), has held that a bare finding that the requirements of Rule 11 have not been satisfied at arraignment warrants vacation of a

guilty plea without regard to the actual circumstances. *Heiden* v. *United States*, 353 F. 2d 53 (C.A. 9). That ruling was made in a case where the defendant pleaded guilty without benefit of counsel,[10] so that the result could well be explicable by the particular facts involved. Moreover, the Ninth Circuit itself modified its rigid *Heiden* ruling in *McClure* v. *United States*, 389 F. 2d 279, where a correction of the defect in the Rule 11 procedure at the time of sentencing was held sufficient to deny relief. And in *Castro* v. *United States*, No. 21694 (decided May 28, 1968), the Ninth Circuit declined to give *Heiden* retroactive application.

No other circuit has followed *Heiden;* indeed, four circuits have expressly rejected its rigid approach. *Kennedy* v. *United States*, No. 18473 (C.A. 6, decided June 26, 1968); *Halliday* v. *United States*, 380 F. 2d 270 (C.A. 1);[11] *Stephens* v. *United States*,

[10] Similarly, in *Hulsey* v. *United States*, 369 F. 2d 284 (C.A. 5), quoted from at length by petitioner (Pet. Br. 30–32), the defendant was without counsel and flatly contradicted the existence of an essential element of the crime with which he was charged at the time he pleaded guilty (see 369 F. 2d at 286).

[11] Petitioner relies extensively on the *Halliday* decision, as well as on *Fultz* v. *United States*, 365 F. 2d 404 (C.A. 6), and *Munich* v. *United States*, 337 F. 2d 356 (C.A. 9), for the proposition that a duty of inquiry rested upon the trial judge to ascertain whether the guilty plea was voluntarily and knowingly entered (Pet. Br. 20–23). Assuming, however, the existence of such a duty of inquiry, both prior to 1966 and under Rule 11 as amended, the question remains as to the scope of the inquiry required before a judge can properly accept such a plea, and, of more pertinence at this juncture, whether a technical failure to comply with the rule warrants vacation of a judgment of conviction entered on the basis of a guilty plea which,

376 F. 2d 23 (C.A. 10), certiorari denied, 389 U.S. 881; *Brokaw* v. *United States*, 368 F. 2d 508 (C.A. 4), certiorari denied, 386 U.S. 996. Another circuit, which has termed the *Heiden* rule a "novel doctrine," has rejected it in principle. *Rimanich* v. *United States*, 357 F. 2d 537 (C.A. 5); see also *Laughner* v. *United States*, 373 F. 2d 326 (C.A. 5); *Lane* v. *United States*, 373 F. 2d 570 (C.A. 5); *Simon* v. *United States*, 269 F. Supp. 738 (E.D. La.). Other courts of appeals have evidently chosen to ignore *Heiden* when deciding cases raising an alleged failure to observe Rule 11. See *United States* v. *Del Piano*, 386 F. 2d 436 (C.A. 3), certiorari denied, No. 1483 Misc., 1967 Term (June 17, 1968); *United States* v. *Rizzo*, 362 F. 2d 97 (C.A. 7); *Arnold* v. *United States*, 359 F. 2d 425 (C.A. 3); *Bartlett* v. *United States*, 354 F. 2d 745 (C.A. 8), certiorari denied 384 U.S. 945. In sum, the courts of appeals have generally regarded the central issue in cases like the present one to be whether the guilty plea was in fact knowingly and voluntarily entered, rather than whether the trial judge literally complied with Rule 11.

---

in view of all the circumstances, was plainly made in a voluntary and knowing manner. It is true that in *Munich* the Ninth Circuit reversed the district court's denial of a motion to vacate and remanded the case to afford the defendant an opportunity to plea anew (337 F. 2d at 361). But that holding simply presaged the Ninth Circuit's adoption of its unnecessarily rigid approach in *Heiden* (see *supra*, pp. 17–18), and was based on the court's conclusion that the non-compliance with Rule 11 there was prejudicial to the defendant. Moreover, in *Munich*, *Halliday* and *Fultz* there was no indication that the trial judge personally addressed any questions to the defendants. In *Fultz* counsel was not appointed until the day the plea was entered, and in *Munich* counsel never stated whether he had advised the defendant regarding his guilty plea.

This approach does not vitiate the significance of Rule 11. It still serves two important purposes (1) by providing the general standards the trial court must follow in accepting a guilty plea (see *supra*, pp. 14–16), and (2) in determining the burden of proof with respect to the voluntary and knowing nature of a guilty plea. The initial burden of showing an inadequate Rule 11 inquiry rests upon the defendant. Once absence of a proper inquiry is established, the burden shifts to the government to show that, realistically, no fundamental error resulted from the trial judge's failure to comply literally with the rule.[12] To the extent that amended Rule 11 requires district courts to make a more extensive inquiry than was required under the former rule, a defendant challenging a guilty plea has an easier task in showing a failure to comply with Rule 11, and the government's burden in opposing such an attack has been correspondingly increased. Nevertheless, if a reviewing court can determine from the record and accompanying papers that the defendant was aware of the consequences of his plea and understood the nature of the charge, and that he voluntarily entered his plea, then no purpose is served by vacating the conviction merely because

[12] The *Heiden* decision was apparently intended by the Ninth Circuit to obviate the necessity of hearings on collateral attacks of guilty pleas by defendants disappointed with their sentences. It has not succeeded in that purpose. Thus, in *Jones* v. *United States*, 384 F. 2d 916 (C.A. 9), a hearing was ordered to consider the defendant's claim that his responses to questions by the trial judge were coerced.

a district court failed to comply completely with all the technical requirements of Rule 11.

In other words, the rule does not require that unless a formalistic ritual was followed, a guilty plea must be thrown out on appeal or collateral attack. Indeed, in *Munich* v. *United States*, 337 F. 2d 356 (C.A. 9), one of the cases cited favorably by the advisory committee which formulated the amendments to Rule 11, and a decision on which petitioner places great reliance—calling it a "leading" and "authoritative" case (Pet. Br. 21)—the court significantly stated (337 F. 2d at 359):

> In determining these questions the court is not required to follow any particular ritual, and it is not necessary that the court personally explain to the defendant the nature of the charge.

B. *If the Court should find that this record does not show that the plea was voluntarily and knowingly entered, the case should be remanded for a hearing on that issue.*

Following imposition of the sentence, petitioner discharged his counsel and retained present counsel. The issues he raised thereafter all related to the procedures followed by the district court incident to accepting his guilty plea. Yet, by failing to file a motion to withdraw his guilty plea under Rule 32(d), F.R. Crim. P., petitioner gave that court no opportunity to consider his allegation that the plea was not voluntarily and knowingly entered. Instead, he immediately appealed to the Seventh Circuit. Apparently, petitioner's position is that the judgment must be vacated if there

was any defect in compliance with Rule 11, regardless of how voluntary and knowing the plea of guilty may in fact have been. In the government's view, the instant record sufficiently shows that the plea was voluntarily entered with an understanding of the charge so that, even if there might have been a technical failure of compliance with Rule 11, the judgment below should nevertheless be affirmed.

We recognize, however, that this Court might conclude that the record does not show either compliance with Rule 11 or that the plea of guilty was voluntarily and knowingly entered. Should this determination be made, it would be appropriate, we submit, for the Court simply to remand the case for a hearing in the district court. Rule 32(d), F.R. Crim. P., provides that after sentencing a plea of guilty may be set aside "to correct manifest injustice." There would be no manifest injustice and no reason to set aside petitioner's guilty plea if the plea was in fact knowingly and voluntarily entered. Hence, if the *Heiden* rule, for which petitioner contends, should be rejected (as all the other circuits have done), the question of the voluntary and knowing nature of the plea becomes a question of fact which must be determined initially by the district court after conducting a hearing. At such a hearing there would be an opportunity to present all the facts relating to whether the plea was in fact voluntary and knowing.

Of course, the accepted and usual way of attacking a plea of guilty is by filing a motion to withdraw the plea under Rule 32(d), or by filing a motion to vacate sentence under 28 U.S.C. 2255. 8 Moore's *Federal*

Practice ¶ 11.04 (2d ed. 1967); 2 Orfield, *Criminal Procedure under the Federal Rules* ¶ 11.49 (1966). Either of these procedural avenues (which for present purposes are virtually synonymous) will normally provide a far better method of presenting the issue to an appellate court than the one followed here, where the reviewing court is in effect asked to pass upon the voluntary and knowing nature of the plea from the transcript of arraignment and sentencing alone.[13] Here, however, petitioner failed to follow either of these courses. Thus, should the Court not accept our view that the record affirmatively shows that petitioner's plea was knowingly and voluntarily entered, the appropriate disposition would be to remand for a hearing in the district court on that issue.[14]

---

[13] It should be noted that all the cases cited by petitioner involving Rule 11 arose on collateral attack. *Cerniglia* v. *United States*, 230 F. Supp. 932 (N.D. Ill.); *Fultz* v. *United States*, 385 F. 2d 404 (C.A. 6); *Halliday* v. *United States*, 380 F. 2d 270 (C.A. 1); *Heiden* v. *United States*, 353 F. 2d 53 (C.A. 8); *Hulsey* v. *United States*, 369 F. 2d 284 (C.A. 5); *Kadwell* v. *United States*, 315 F. 2d 667 (C.A. 9); *Munich* v. *United States*, 337 F. 2d 356 (C.A. 9); *United States* v. *Davis*, 212 F. 2d 264 (C.A. 7). Our research has failed to disclose any case where a defendant used the process of direct attack by appeal to challenge the voluntariness or knowing nature of his guilty plea.

[14] In addition to relying on Rule 11, petitioner contends that the judgment of conviction against him, on the basis of the guilty plea he entered, violated his rights under the Fifth and Sixth Amendments (Pet. Br. 29–32). What the Sixth Amendment requires, however, is that a criminal defendant "be informed of the nature and cause of the accusation * * *." That requirement applies both to defendants who plead not guilty

CONCLUSION

For the reasons stated, the judgment below should be affirmed. If this Court should conclude otherwise, the cause should be remanded to the district court for a hearing on whether the guilty plea was voluntarily and knowingly entered.

ERWIN N. GRISWOLD,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

FRANCIS X. BEYTAGH, JR.,
Assistant to the Solicitor General.

BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

AUGUST 1968.

---

and stand trial and those who, like petitioner, elect to plead guilty. It has always been thought to be satisfied by a properly explicit indictment or information brought against an accused (*e.g.*, *United States* v. *Cruikshank*, 92 U.S. 542, 557–558), and petitioner cites no authority to the contrary. As to his Fifth Amendment claim, we agree that due process concepts protect against conviction on the basis of a guilty plea entered involuntarily or without an understanding of the charge against an accused. But Rule 11 seeks to go beyond what would strictly be required, as a constitutional matter (*e.g.*, *Sullivan* v. *United States*, 315 F. 2d 304 (C.A. 10), certiorari denied, 375 U.S. 910), and the issues here are whether the requirements of that rule, as amended in 1966, were complied with adequately, and, if not, whether it is nonetheless clear that petitioner's plea was knowingly and voluntarily made. Even should the Court resolve both of these issues against the government, petitioner would only be entitled to a further hearing as to the voluntary and knowing nature of his guilty plea. In short, petitioner's purported reliance on the Fifth and Sixth Amendments adds nothing to the case and works no change in the issues presented.

U.S. GOVERNMENT PRINTING OFFICE: 1968